

**Legal Aid Services Council's supplementary views
presented to the Legislative Council
on National Security (Legislative Provision) Bill**

On 2 June 2003, the Legal Aid Services Council (the Council) presented its views on the Bill to the Legislative Council. On 6 June 2003, the Administration provided the first draft of its Committee Stage Amendments (CSAs) to the Bill. The Council notes that the Council's submission was discussed at the Bills Committee's meeting held on 10 June 2003. The Council wishes to respond to some of issues discussed and to express its views on the CSAs, so that the Bill can be improved.

(I) Issues raised at the Bills Committee meeting on 10 June 2003

Rule 13 of the Legal Aid in Criminal Cases Rules (Cap 221 Subsidiary Legislation)

2. The Council believes that the Legislative Council is competent to enact the amendments proposed in paragraphs 12 and 13 of our submission dated 2 June 2003.

Sections 8C(1)(e) and 8B(4) of the Societies Ordinance

3. We take a view different from that expressed by Mr Allcock, Solicitor General, on 10 June 2003. After a local organization is proscribed, an office bearer of the local organization commits an offence when he acts or claims himself to be an office bearer of the local organization. He commits such an offence when he seeks legal advice as to an appeal against the proscription decision of his local organization. A lawyer commits the offence of giving aid to the proscribed local organization when he gives pro bono advice to the office bearer, who nonetheless is acting on behalf of the organization. The proscribed local organization also benefits from the legal advice. We hold the view that services paid for do not come within the expression of "gives any other form of aid". It is true that section 8D(2) provides that lodging an appeal against the proscription decision "and doing any incidental act" are not to be regarded for the purposes of section 8C as acting as an office-bearer or member. But the exception operates only to except the office-bearer or member but not the lawyer. And our concern is directed not at the office-bearer or member but the giver of legal aid. This absence of any reference to anybody other than an

office-bearer or member giving aid in connection with an appeal cannot be remedied by a strained construction of the provisions to provide consistency with section 8E(3)(b), which envisages appointment of legal representatives by the appellant.

(II) First draft of CSAs

Crimes Ordinance

4. The Council welcomes the proposed CSA to section 9A(1) to provide added certainty that the offence of sedition requires mens rea. We also welcome the proposed addition of section 9A(1A)(a). Under the common law, incitement will be committed with the mere encouragement of another to commit an offence, irrespective of whether or not the incited person commits the offence. The CSA requires the prosecution in sedition to provide evidence to prove that one or more of the persons incited are likely to be induced to commit the offences concerned. However, the CSA also proposes to add section 9A(1A)(b), which provides that the offence of sedition will be committed if "an ordinary person" would likely be induced to commit the offences concerned. The use of the phrase "ordinary person" means that the test is speculative (normally not requiring evidence) and is variable. As the proposed section 9A(1)(b) offence can be committed outside Hong Kong, it may be possible for the "ordinary person" to have different attributes, depending on whether the alleged offence is committed in Hong Kong, China Mainland or elsewhere. We propose that section 9A(1A)(b) be deleted.

5. The Council notes that the proposed CSA to section 9C(3) provides a three year time limit to the offence of handling seditious publication. We maintain the view stated in our submission dated 2 June 2003 that the six month time limits for sedition should be retained for all forms of sedition, including sedition by inciting commission of treason, subversion or secession [section 9A(2)(a)]; and sedition by inciting violent public disorder seriously endangering the stability of the People's Republic of China (PRC) [section 9A(2)(b)]. We do not see any ground to prolong the time limit from six months to three years.

6. Apart from retaining the existing time limits for treason and sedition, we propose that a three year time limit should be provided for the new offences of subversion and secession, for the reasons stated in paragraph 10 of

our submission dated 2 June 2003. In gist, there should be timely prosecution of such offences since the practical effect of such acts is likely to be immediate. Instituting prosecution a long time after the act, when the act itself may be looked upon with different values, is likely to be considered oppressive or could lead to an application for permanent stay.

7. Proposed CSA to paragraph 13 of the Schedule to the Bill seeks to repeal section 7(6) of the Crimes Ordinance, which provides that prosecution for an offence of incitement to disaffection requires the consent of the Secretary for Justice. We consider that the safeguard should not be removed.

Societies Ordinance

8. We note that the proposed CSA to section 8C makes clear that paying money or giving other forms of aid to an organization is an offence only in respect of conduct after the proscription. However, this does not remove the concern expressed in paragraph 14 of our earlier submission that providing legal aid or legal assistance to an office-bearer or member of a proscribed organization may be unlawful. Paragraph 3 above is also relevant.

9. We welcome the proposed CSA to section 8D(6), so that the Court of First Instance, instead of the rules made the Secretary to Security, will decide whether evidence not normally admissible in a court of law may be admitted in an appeal against proscription.

10. The proposed CSA to add section 8(D)(7) & (8) seeks to restrict the right of appeal to the Court of Appeal on a proscription decision to one requiring leave of the court and only on points of law. Given that the proposed grounds of appeal to the Court of First Instance are already limited, and that restricting appeals to points of law may restrict questioning of issues of sufficiency of evidence [section 8D(3)(a)(ii) & (iii)] on further appeal, we suggest to delete the words "on any ground involving a question of law" in the proposed section 8D(7) and delete section 8D(8) altogether.

11. The proposed CSA to section 8E seeks to give the Secretary for Security the power to make certain regulations relating to an appeal against the proscription decision. According to the Administration's proposal, the Secretary for Security is responsible for making the decision to proscribe a local organization. If the Secretary is also responsible for making the regulations

restricting the disclosure of the reasons for proscription and the materials relied on to support the proscription, and limiting access to the appeal hearing, there will be a role conflict. To avoid this, we propose that the regulations be made by the Chief Executive in Council.

12. According to the CSA proposing to add section 8G and Schedule 2, the assets of a proscribed organization would upon the organization being wound up do not have any owner ("bona vacantia") and thus belong to the HKSAR Government. This can be the result even if there is no proof that the properties are proceeds of crime or earmarked for the commission of a crime. We question whether these provisions entail unlawful deprivation of private properties.

(III) Extra-territoriality

13. We mentioned in paragraph 11 of our submission dated 2 June 2003 that proposed sections 16A and 18 of the Official Secrets Ordinance should be amended so that extra-territorial effect of the proposed offences may apply only to Chinese nationals. We wish to add that the Bill also seeks extra-territorial power against a Hong Kong permanent resident in respect of the offences of subversion [section 2A(3) of the Crimes Ordinance] and secession [section 2B(3) of the Crimes Ordinance]; and against any person in respect of the offences of conspiracy or attempt to do certain acts outside Hong Kong (section 2C of the Crimes Ordinance). For the reasons given in paragraph 11 of our submission dated 2 June 2003, we propose that the above sections should be amended so that the proposed offences may apply only to Chinese nationals.

Date : 20 June 2003
